

PERKINS COIE LLP

Sunita Bali, Bar No. 274108
SBali@perkinscoie.com
Angie Young Kim, Bar No. 270503
AngieKim@perkinscoie.com
Tyler Fergusson, Bar No. 345065
TFergusson@perkinscoie.com
605 Howard Street, Suite 1000
San Francisco, CA 94105
Telephone: 415.344.7000
Facsimile: 415.344.7050

Michael R. Huston (*pro hac vice*)
MHuston@perkinscoie.com
Matthew R. Koerner (*pro hac vice*)
MKoerner@perkinscoie.com
2901 N. Central Avenue, Suite 2000
Phoenix, AZ 85012
Telephone: 602.351.8000
Facsimile: 602.648.7000

Ryan Spear (*pro hac vice*)
RSpear@perkinscoie.com
1201 Third Avenue, Suite 4900
Seattle, WA 98101
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Defendant Google LLC

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

REPUBLICAN NATIONAL COMMITTEE,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

No. 2:22-cv-01904-DJC-JDP

**DEFENDANT GOOGLE LLC'S REPLY IN
SUPPORT OF MOTION TO DISMISS
THE REPUBLICAN NATIONAL
COMMITTEE'S VERIFIED FIRST
AMENDED COMPLAINT**

Date: March 14, 2024
Time: 1:30 p.m.
Dept: Courtroom 10, 13th Floor
Judge: The Hon. Daniel J. Calabretta

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1 **I. Introduction**

2 The Amended Complaint still has all the same flaws this Court identified when it
 3 dismissed the RNC's original complaint, plus a few more. The RNC still fails to plead
 4 required elements for each of its only two remaining claims for relief. And the RNC still
 5 does not come close to plausibly alleging that political-viewpoint discrimination was
 6 the reason why some of its emails were flagged as spam by Gmail's spam filters—as
 7 opposed to the obvious alternative explanation that recipients of the RNC's emails
 8 frequently marked them as spam. Nothing in the RNC's Opposition to Google's
 9 Motion to Dismiss ("Opp.") rectifies those flaws.

10 When this Court dismissed the RNC's claim for intentional interference with
 11 prospective economic relations, it observed that California law requires the RNC to
 12 allege some "independently wrongful" act. Dkt. 53 at 28-30 ("Order"). But the RNC still
 13 fails to do so. It relies on the circular argument that Google's alleged violation of the
 14 Unfair Competition Law ("UCL") qualifies as the "independently" wrongful act, just as
 15 the RNC claims tortious interference as the predicate act under the UCL. The RNC's
 16 only other theory of wrongfulness is its unprecedented assertion that email services
 17 like Gmail are common carriers, an assertion this Court already rejected because it
 18 would mean email services must "deliver spam." Order 22. And the RNC still fails to
 19 identify *anyone* who would have donated to it but did not because of spam filtering.

20 The RNC's UCL claim also fails because the RNC does not plead its entitlement
 21 to the only possible remedy—an injunction. The Amended Complaint concedes that
 22 the spam filtering to which the RNC objects has not occurred for more than a year,
 23 and the RNC offers nothing besides baseless speculation to suggest it could recur.
 24 The RNC's problem with Google's spam filter has thus long-since been resolved, and
 25 courts do not issue injunctions to address non-problems. Moreover, no court has ever
 26 held that it is unlawful or unfair for an email service to filter objectionable spam.

27 The RNC attempts to conceal its pleading deficiencies with its political-
 28 viewpoint discrimination theory, but its allegations are no more plausible than when

1 this Court last dismissed them. Indeed, the new allegations in the RNC's Amended
2 Complaint make the RNC's discrimination theory even less plausible now.

3 Finally, the RNC's claims are still foreclosed by the clear text of Section 230.
4 Many of the RNC's featured allegations serve only to undermine its discrimination
5 theory and support the obvious alternative explanation: Some RNC emails went to
6 spam folders for good-faith reasons within *the RNC's control*, including because of the
7 RNC's persistently high spam-complaint rates and hyperlinks within its emails. And
8 nothing in the RNC's opposition remedies the core implausibility of the Amended
9 Complaint: The RNC cannot plausibly explain why Google would engage in political-
10 viewpoint discrimination but would do so only for a small percentage of messages
11 and only intermittently. The obvious explanation is the one that Google long ago gave
12 the RNC: "a lot of Gmail users [were] marking [RNC] messages as spam." First
13 Amended Complaint ("FAC") ¶ 61 (second alteration in original).

14 After two unsuccessful attempts to plead plausible claims against Google, there
15 is no reason to think the defects of these claims can be cured. This Court therefore
16 should dismiss the Amended Complaint with prejudice.

17 **II. Argument**

18 **A. The RNC still fails to plead the required elements for Count Four.**

19 This Court dismissed the RNC's intentional interference claim because the RNC
20 failed to allege that Google's "alleged interference constituted a separate,
21 independently 'wrongful act' that would be an appropriate predicate offense." Order
22 30. The Amended Complaint does not remedy that deficiency. See Motion to Dismiss
23 ("MTD") 8-12. And the RNC's Opposition does not alter that conclusion.

24 **1. The RNC still fails to plead "independently wrongful conduct."**

25 The RNC does not dispute that its dismissed-with-prejudice claims cannot form
26 the basis for independently wrongful conduct. See MTD 9; Opp. 18-21. Nor does the
27 RNC defend its new allegation that Google somehow violated "established industry,
28 trade or professional rules or standards, such as Google's own terms of service and

1 implied warranties.” FAC ¶ 158; see MTD 9-10. By failing to address Google’s
 2 challenges to those arguments, the RNC “has abandoned” them. *Carvalho v. Equifax*
 3 *Info. Servs., LLC*, 629 F.3d 876, 888 (9th Cir. 2010). The only other predicate offense
 4 alleged in Count Four is a violation of the UCL. See FAC ¶ 158. But the RNC’s UCL
 5 claim cannot serve as a predicate offense because the RNC still fails to plead a viable
 6 remedy and the necessary elements of that claim. See Part II.B; *New.Net, Inc. v.*
 7 *Lavasoft*, 356 F. Supp. 2d 1090, 1114 & n.11 (C.D. Cal. 2004) (“Plaintiff cannot show
 8 that Defendant engaged in independently wrongful conduct[]” with the “circular
 9 reasoning” that “the [UCL] claim should be sustained because Defendant’s conduct
 10 ... constituted ... tortious interference” and “its tortious interference claim should be
 11 sustained because Defendant’s conduct purportedly violates the ... [UCL].”).

12 The RNC’s Opposition then shifts tactics and raises a new predicate offense.
 13 Recognizing that this Court has already dismissed its *statutory* common-carrier claims,
 14 Order 23, the RNC repackages them under “the *common law*’s established common-
 15 carrier doctrine.” Opp. 20 (emphasis added). The RNC does not specify which
 16 “common law” it relies on (e.g., California or federal), and this new theory does not
 17 appear in the RNC’s allegations regarding this claim. See FAC ¶¶ 154-163. But
 18 regardless, the RNC’s new argument fails for two reasons.

19 **First**, under California law, “Civil Code section 2100 codified the common law
 20 governing common carriers.” *Webster v. Ebright*, 3 Cal. App. 4th 784, 786 (1992). And
 21 under that statute, Google is “not a common carrier,” as this Court has already held.
 22 Order 21. The result is the same under California common law. See *Webster*, 3 Cal.
 23 App. 4th at 791 (“[T]he Civil Code, as a matter of fact, was not designed to make any
 24 general alterations in the established doctrines and rules of the common law.”)
 25 (citation omitted). Nor is Google a common carrier under some other common law.
 26 The RNC continues to advance what this Court described as an “amorphous definition
 27 of common carrier” that invokes the “public interest.” Order 21; see Opp. 20 (quoting
 28 *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 470-472 (5th Cir. 2022)). But regardless of

1 the applicable standard, “no court ... has found an email service provider [like
 2 Google] to be a common carrier.” Order 16. Nor is that surprising; accepting the
 3 RNC’s position would mean Google could not filter spam *at all* and would be required
 4 to “deliver spam to the millions of Americans who use [its] services”—even though all
 5 agree spam is not just annoying but often dangerous. Order 22. This Court wisely
 6 rejected that unprecedented and reckless argument before. It again should not “be
 7 the first” (Order 16) to find that email services are actually common carriers.

8 **Second**, “even if Google were a common carrier, the RNC did not avail itself of
 9 Google’s services, and Google owes no duty to it.” Order 22. Common carriers owe
 10 certain duties only “towards their customers.” *Grotheer v. Escape Adventures, Inc.*, 14
 11 Cal. App. 5th 1283, 1294 (2017) (cited at Order 22). But the RNC “is not a Gmail user.”
 12 Order 36. The RNC thus fails to establish any “independently wrongful conduct.”

13 **2. The RNC still fails to allege this claim’s other four elements.**

14 The RNC also fails to allege the four remaining elements of intentional
 15 interference: a specific economic relationship, knowledge, disruption, and harm. See
 16 *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 522, 525 (1996).

17 The RNC does not identify any “specific” subscribers, their relationship with the
 18 RNC, or their donation history. MTD 10–11. Instead, the RNC says its vague allusions to
 19 unnamed “subscribers,” some of whom might be donors or potential donors, are
 20 enough. Opp. 18–19. They are not. A plaintiff must plead “that the defendant
 21 ... disrupted a particular relationship with a *known* third party.” *Roy Allan Slurry Seal,*
 22 *Inc. v. Am. Asphalt S., Inc.*, 2 Cal. 5th 505, 516 (2017) (emphasis added).

23 Because the RNC fails to “specif[y] [any] third party,” it necessarily fails to plead
 24 that Google knew of those relationships. *Soil Retention Prods., Inc. v. Brentwood*
 25 *Indus., Inc.*, 521 F. Supp. 3d 929, 962 (S.D. Cal. 2021). It is not enough to allege, as the
 26 RNC contends (Opp. 19), simply that it “made Google aware” of “email diversions”
 27 and “potential harm.” *Swipe & Bite, Inc. v. Chow*, 147 F. Supp. 3d 924, 935 (N.D. Cal.
 28 2015) (dismissing claim where “Plaintiff merely alleges that [defendant] knew of the

1 agreements [Plaintiff] had with ‘contractors, vendors, employees, and customers’”).

2 On the remaining two elements (MTD 11-12), the RNC does not deny that it
3 fails to allege any specific lost donations. See Opp. 20-21. Instead, the RNC says the
4 inboxing issues “harm[ed] the RNC’s ability to fundraise, communicate with, and
5 mobilize its supporters” at the end of the month. Opp. 20. But that vague assertion
6 fails “to plead facts either showing or allowing the inference of actual disruption to
7 [the RNC’s] relationship” with specific donors. *Sybersound Recs., Inc. v. UAV Corp.*,
8 517 F.3d 1137, 1151 (9th Cir. 2008); see *Soil Retention*, 521 F. Supp. 3d at 963. The
9 problem is not the RNC’s failure to allege “exact damages” (Opp. 20); it is the failure
10 to plausibly plead any specific losses at all caused by the alleged inboxing issue.

11 The bottom line: To plausibly allege interference by Google with prospective
12 donations, the RNC had to identify at least one person who would have donated but
13 did not because certain emails were delivered to that person’s spam folder. The RNC’s
14 admitted failure to do so is yet another reason to dismiss this claim again.

15 **B. The RNC fails to plead a claim under the Unfair Competition Law.**

16 The RNC fails to state a claim under the UCL for two reasons: it does not plead
17 either a viable remedy or any unlawful or unfair conduct.

18 **1. The RNC lacks a remedy under the UCL.**

19 The only remedies available under the UCL are restitution or an injunction. MTD
20 12-14. The RNC does not claim to seek restitution. See Opp. 12-18. So the only live
21 issue is whether the RNC has pleaded the requirements for an injunction under the
22 UCL. It has not. The UCL claim must therefore be dismissed.

23 Hoping to avoid that result, the RNC tries to re-frame the issue as a “mootness”
24 issue under federal law. Opp. 17. That simply misunderstands Google’s argument,
25 which focuses on the legal standard for a remedy under state law. Again, under the
26 UCL, “[i]njunctive relief is appropriate only when there is a threat of continuing
27 misconduct.” *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 463 (2005). It “is not a
28 remedy designed to right completed wrongs.” *Id.* at 465.

1 But that is precisely what the RNC seeks to do here. The RNC concedes the
 2 alleged misconduct “has stopped.” FAC ¶ 4. It does not allege any facts showing any
 3 future threat of objectionable spam filtering. Thus, under California law, the RNC
 4 “fail[s] to present a viable claim for injunctive relief.” *Madrid*, 130 Cal. App. 4th at 466;
 5 see *id.* at 462 (sustaining demurrer where the “complaint’s factual allegations referred
 6 only to acts that happened in the past” and “did not allege a continuing threat”).

7 For many of the same reasons, the RNC also lacks Article III standing. As
 8 Google explains (MTD 13), a party lacks standing for injunctive relief unless it alleges a
 9 “real or immediate threat that [it] will be wronged again.” *City of Los Angeles v. Lyons*,
 10 461 U.S. 95, 111 (1983). “[P]ast exposure to harmful or illegal conduct does not
 11 necessarily confer standing to seek injunctive relief if the plaintiff does not continue to
 12 suffer adverse effects.” *Wright v. Serv. Employees Int’l Union Local 503*, 48 F.4th 1112,
 13 1120 (9th Cir. 2022). That, again, is the case here where the RNC seeks merely to
 14 remedy “[p]ast wrongs,” not to stop “the threat of future injury.” *Id.* at 1118.

15 Nor does the voluntary-cessation doctrine apply here, contrary to the RNC’s
 16 suggestion. See Opp. 17. For standing, a plaintiff must allege that a defendant’s
 17 “unlawful conduct ... was occurring at the time the complaint was filed” or that
 18 “threatened injury [is] certainly impending.” *Friends of the Earth, Inc. v. Laidlaw Env’t*
 19 *Servs., Inc.*, 528 U.S. 167, 184, 190 (2000). By comparison, mootness and voluntary
 20 cessation apply after “the case has been brought and litigated, often ... for years.” *Id.*
 21 at 191. But again, as the RNC concedes, Google’s alleged misconduct “stopped”
 22 before the Amended Complaint was filed. FAC ¶ 4. In fact, the last time the inboxing
 23 issue allegedly occurred was weeks before the RNC first filed suit. FAC ¶ 103. This
 24 conduct thus was not “occurring” when the RNC sued. Nor does the RNC allege any
 25 “real or immediate threat that [it] will be wronged again.” *Lyons*, 461 U.S. at 111.

26 Under California and federal law, the RNC does not plead a right to UCL relief.
 27
 28

2. The RNC still fails to plead unlawful or unfair conduct.

In dismissing the RNC's UCL claim, this Court "granted leave to amend this claim to establish a plausible theory of unfairness or unlawfulness." Order 37. As Google explained (MTD 14-15), the RNC fails to establish either prong.

For the "unlawfulness" prong, the RNC concedes that its unlawfulness theory survives only if the RNC pleads "its other claims, including the interference claim." Opp. 12 n.8. But that is the only other claim remaining (see Order 38), and the RNC may not premise its UCL claim on its tortious interference claim, and its tortious interference claim on its UCL claim, as that "tortured circular reasoning" effectively eliminates key elements of both claims. *New.Net, Inc.*, 356 F. Supp. 2d at 1114 n.11. And in any event, the RNC's intentional-interference claim fails for all of the reasons discussed above. See Part II.A.

The RNC also fails to establish the "unfairness" prong. The essence of the RNC's claim still sounds in fraud and so must allege reliance *and* satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b). MTD 15. For example, the RNC alleges that Google falsely "presents Gmail as an email service provider that delivers emails in a fair and good-faith manner." FAC ¶ 151. Though the RNC disputes that this allegation sounds in fraud (Opp. 15-16), this Court has already found that language to "sound[] in fraud such that the RNC would still be required to plead reliance." Order 36 (citing Complaint (Dkt. 1) ¶ 78). The RNC still does not do so. Indeed, the RNC could not have relied on this statement because the RNC "is not a Gmail user." *Id.*

The RNC argues instead that the Amended Complaint adequately alleges a fraudulent statement under Rule (9)(b) because it "alleges that the communications occurred between RNC and Google employees, provides the approximate date, quotes the email communications, and explains why Google's excuse for the diversion is incorrect." Opp. 16. But none of those communications shows, as the RNC must, "that the misrepresentation was an immediate cause of the injury-producing conduct." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 327 (2011) (citation omitted). Nor do

1 they show any reliance because, again, the RNC “is not a Gmail user.” Order 36.

2 The RNC next contends that it satisfies all three tests for the “unfairness” prong.
 3 Opp. 12-15. To start, the RNC invokes the first two tests, requiring that a “practice’s
 4 impact on the victim outweighs ‘the reasons, justifications and motives of the alleged
 5 wrongdoer’” or that “the practice is ‘immoral, unethical, oppressive, unscrupulous or
 6 substantially injurious to consumers.’” Opp. 12-13 (quoting *Doe v. CVS Pharmacy, Inc.*,
 7 982 F.3d 1204, 1214-1215 (9th Cir. 2020)). To satisfy these two tests, the RNC relies
 8 on its political-discrimination theory. Opp. 13-14. But that theory is implausible, as
 9 explained below, so it fails to satisfy either test. See Part II.C.1. And neither of the
 10 cases on which the RNC relies (Opp. 13) found that alleged “[d]iscrimination based on
 11 political affiliation or views” was unfair. One considered alleged “discriminat[ion]
 12 against persons of Iranian or Middle Eastern descent.” *Nia v. Bank of Am., N.A.*, 603
 13 F. Supp. 3d 894, 899 (S.D. Cal. 2022). The other considered alleged “age
 14 discrimination.” *Candelore v. Tinder, Inc.*, 19 Cal. App. 5th 1138, 1142 (2018). The
 15 RNC fails to identify any case holding that political discrimination qualifies as an
 16 “unfair practice” under the UCL. And given the dramatic implications that would follow
 17 from holding that a private business must accept all comers no matter their political
 18 viewpoints, this Court should not be the first to judicially impose that standard. *Cf.*
 19 Order 25 (“[T]his Court declines to effectively add ‘political affiliation’ to the long list of
 20 characteristics protected by the Unruh Act.”).

21 The RNC also relies on the third unfairness test, requiring a plaintiff to plead
 22 that “the challenged conduct is ‘tethered to any underlying constitutional, statutory or
 23 regulatory provision.’” Opp. 13 (quoting *Doe*, 982 F.3d at 1214-1215). The RNC says
 24 that “Google’s conduct is at least ‘comparable’ to actual violations of the other laws,”
 25 including “the Unruh Civil Rights Act” and “California’s common-carrier law.” Opp. 14.
 26 But the RNC already made the same argument before. See Dkt. 35 at 19 (“Google’s
 27 conduct is at least ‘comparable’ to violations of other asserted laws.”). And this Court
 28 already disagreed and dismissed those claims with prejudice. Order 16-28, 36-37.

Even on the merits, neither the Unruh Act nor any common-carrier law supports the RNC's unfairness argument. As this Court has explained, "'political affiliation' is not one of the enumerated classes under the Unruh Act.'" Order 23. And under common-carrier law (statutory or the common law), Google is not a common carrier and does not owe the RNC any duty, as Google explains above. See Part II.A.1. No conduct alleged by the RNC here is comparable to or the same as violations of those laws.

C. Section 230 of the Communications Decency Act bars this suit.

Three separate forms of statutory protections continue to bar the RNC's claims.

1. The RNC still does not plausibly allege political discrimination, so Section 230(c)(2)(A) applies.

After finding all the requirements for Section 230(c)(2)(A) satisfied, Order 6-15, this Court granted leave to amend *only* to give the RNC an opportunity to plead "a lack of good faith" on Google's part. Order 15. The Court previously did "not find the RNC's allegation that Google was knowingly and purposefully harming the RNC because of political animus to be a 'reasonable inference.'" Order 12. Nothing in the Amended Complaint makes that inference more reasonable than it was before.

First, the RNC says it followed the "best practices" for bulk emailers (like itself), including emailing only those "who requested it and who recently actively engaged with RNC content" and "run[ning] many internal tests." Opp. 4. But the RNC's own allegations show it regularly violated those "best practices," including the most important one: reducing how frequently recipients of the RNC's emails marked them as spam.

Critically, as the RNC discloses for the first time in its Amended Complaint, its "average spam rate" during the relevant time period "was approximately 0.14%" and even hit "0.3%." FAC ¶ 42. These user-generated spam-complaint rates flout industry-standard guidance, including from Google, that rates over 0.1% (and especially 0.3%) can "lead to increased spam classification." *Prevent mail to Gmail users from being blocked or sent to spam*, Google Help, perma.cc/95SX-5HJM ("*Bulk Email Recommendations*"). The RNC's own vendor Salesforce has long agreed, in guidance the RNC

1 does not dispute: “The limit for spam complaints is ... 0.1%” and “spam rates have a
 2 lasting negative impact.” Salesforce, Abuse Reports, perma.cc/NQT6-556B?type=im-
 3 age (Jan. 15, 2020) (“*Salesforce Guidance*”); see MTD 3, 17. Nor does the RNC dispute
 4 that these spam-complaint rates are the most important input for Gmail’s spam filters.
 5 See MTD 5. But contrary to all of that guidance and advice, and as Google warned the
 6 RNC, “a lot of Gmail users [were] marking [RNC] messages as spam.” FAC ¶ 61 (sec-
 7 ond alteration in original). The RNC’s high spam-complaint rates—contrary to the best
 8 practices it says it followed—thus provide an “obvious alternative explanation” for the
 9 RNC’s inboxing issues. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007).¹

10 The RNC’s does not dispute that this guidance is incorporated by reference into
 11 the Amended Complaint. See MTD 3. Indeed, the RNC relies on the same guidance—
 12 including as to spam-complaint rates—to support its other arguments. See, e.g., Opp.
 13 9 (quoting *Bulk Email Recommendations*). Rather, the RNC complains that Google
 14 added its guidance to one specific website after this lawsuit, purportedly making it a
 15 “self-serving, post-filing alteration.” *Id.* Notably, the RNC ignores that the RNC’s own
 16 vendor, Salesforce, has long published the same guidance. See MTD 3, 16–17. In any
 17 event, Google is simply relying on the RNC’s own allegations about Google’s
 18 published guidance in the RNC’s own Amended Complaint. See FAC ¶ 32 (citing *Bulk*
 19 *Email Recommendations* and incorporating these “Gmail best practices”). And
 20 because “courts must consider the complaint in its entirety, as well as ... documents
 21 incorporated into the complaint by reference,” this spam-rate guidance must be
 22 considered. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018)
 23 (citation omitted). The RNC cannot cherry-pick the parts of this guidance it wants this
 24 Court to consider, see, e.g., FAC ¶ 32; Opp. 9, while simultaneously urging the Court
 25 to “disregard” the unfavorable parts, Opp. 9. The incorporation-by-reference doctrine

26 ¹ Recognizing its problematic spam-complaint rates, the RNC tries to walk back some of its alle-
 27 gations. The RNC contends that its spam-complaint rate was “extremely low, with a median of 0.1%.”
 28 Opp. 1 (citing FAC ¶ 42). But, again, “[t]he limit for spam complaints is 1 per every thousand, or 0.1%.
Salesforce Guidance. And regardless of the “median” rate, the RNC’s “average” rate was even higher:
 “0.14%,” which shows that the RNC’s rate was regularly above 0.1%. FAC ¶ 42.

1 “prevents plaintiffs from selecting only portions of documents that support their
2 claims, while omitting portions of those very documents that weaken—or doom—their
3 claims.” *Khoja*, 899 F.3d at 1002. Here too, the guidance dooms the RNC’s claims.

4 The RNC’s high spam-complaint rates also undermine its argument that Google
5 must have been discriminating based on political viewpoints because, the RNC says, it
6 emailed only those “who requested it and who recently actively engaged with RNC
7 content.” Opp. 4. As this Court observed, “just because a user interacts with a com-
8 pany at one point in time does not mean that the user ‘solicits’ each and every email
9 sent by the entity.” Order 8. The RNC’s high user-generated spam-complaint rates
10 prove that point. Regardless of how “active” recipients allegedly were, they still were
11 marking RNC emails as spam at a much higher rate than the industry recommends.

12 The RNC responds that its alleged A/B test “tends to disprove” the obvious al-
13 ternative explanation that Gmail’s algorithm sent RNC emails to spam mostly because
14 of its high spam-complaint rates, asserting that “both emails [in the test] were sent
15 nearly contemporaneous” and so, if spam-complaint rates were to blame, both emails
16 would have gone to spam. Opp. 11. But that argument ignores that spam-complaint
17 rates are not the *only* spam-filter input. As this Court has already observed, “[t]he fact
18 that one version did [better] indicates it was not the substantive content or sender of
19 the email, but rather some other factor, such as the different links contained with the
20 email or some other technical feature of the email, that was triggering application of
21 the spam filter.” Order 11–12. This is confirmed by the Amended Complaint: “The only
22 difference between the two pages [linked in the two emails] is that one requires the
23 donor to provide a cellphone number, while the other makes the cellphone-number
24 field optional.” FAC ¶ 56. This technical feature—not political animus—is the “obvious
25 alternative explanation” for the A/B test. *Twombly*, 550 U.S. at 567.

26 The RNC agrees (at least in part): there was no “content-based reason” for the
27 A/B test’s inboxing issue. Opp. 11. But, the RNC retorts, “discriminators don’t
28 necessarily discriminate every chance they get.” *Id.* In other words, the RNC abandons

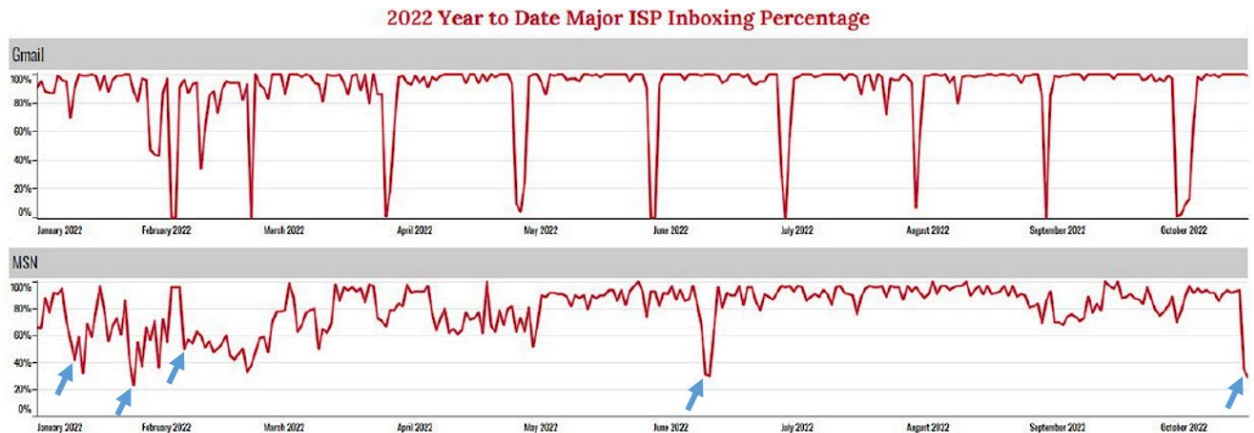
1 its argument that the A/B test shows *any* political discrimination by Google.

2 **Second**, the RNC complains that none of Google’s recommendations on how
3 to fix the inboxing issues “worked” and that Google eventually “fell silent.” Opp. 5-6.
4 But Google working with the RNC “[f]or nearly a year,” including traveling to the RNC’s
5 office to “give a training” on email best practices, is not plausibly consistent with inten-
6 tional discrimination against the RNC’s political viewpoint. FAC ¶¶ 52, 88, 94; see
7 MTD 17 (collecting over a dozen allegations showing good faith). In response, the
8 RNC speculates that “discriminators may go to great lengths to hide” their conduct.
9 Opp. 11-12 (citation omitted). But this Court has already disagreed: “the fact that
10 Google engaged with the RNC for nearly a year and made suggestions that improved
11 email performance is inconsistent with a lack of good faith.” Order 11. Nor do the
12 RNC’s allegations about Google being “silent” make the RNC’s theory any more plau-
13 sible now than before. FAC ¶ 52 (previously Complaint ¶ 30). As the RNC does not
14 dispute, a “defendant’s ‘refusal to discuss in detail its reasons for filtering emails or to
15 provide an acceptable remedy’ [are] insufficient to show a lack of good faith.” MTD 18
16 n.4 (cleaned up) (quoting *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d
17 1097, 1105 (N.D. Cal. 2011)). Nor does it somehow show political discrimination.

18 **Third**, the RNC contends that Google knew “the end-of-month, end-of-quarter
19 period was vital to the RNC.” Opp. 6. If Google meant to discriminate against the RNC
20 at month-end, though, it does not make sense that the RNC had inboxing issues
21 sometimes at the beginning of the month, sometimes in the middle of the month, and
22 sometimes not at all, at month-end. See FAC ¶ 103. And if Google meant to target “vi-
23 tal” periods, Google would also surely have done so when the RNC sent emails almost
24 “hourly” during the 2020 presidential election, when the RNC sent emails over the five
25 weeks leading up to the 2022 elections, and when “the RNC increased its email send
26 volume and frequency” after the 2022 elections. FAC ¶¶ 4, 50, 51, 103. But Google
27 did not, as the RNC admits. FAC ¶¶ 4, 50, 51, 103. The RNC’s theory of intentional dis-
28 crimination, but only for a few days and at certain times, defies “judicial experience

and common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Fourth, the RNC asserts that it did not experience “the same type” of inboxing issue “with other popular email platforms.” Opp. 6. But the Amended Complaint belies that assertion. As the below graphs from paragraph 105 show (with arrows added for emphasis), RNC emails sent to Microsoft (“MSN”) users experienced five inboxing-rate drops of at least 50 percentage points, across five months, with the steepest drop just before the 2022 elections.



Fifth, the RNC relies on the same allegations from before regarding the North Carolina State University study. Opp. 7 (citing FAC ¶ 107 (previously Complaint ¶ 54)). This Court already found “this study is insufficient, standing alone, to meet the pleading requirements.” Order 10. None of the RNC’s new allegations changes that.

Sixth, the RNC exclaims that its allegation about the inboxing issue stopping in 2022 “is damning” and establishes political discrimination. Opp. 8. Not at all. The RNC’s theory for why and exactly when this issue stopped is pure speculation, lacking any factual support. That the RNC does not allege any drop in its inboxing rate after October 2, 2022, FAC ¶ 4, does not suggest—much less plausibly show—that Gmail stopped sending the RNC’s emails to spam *because* of this October 22 lawsuit or the November 8 election. See *Holomaxx*, 783 F. Supp. 2d at 1105 (“While [plaintiff] suggests [ulterior motives], it offers no factual support for these allegations.”). Indeed, the RNC does not try to dispute that its allegations about its inboxing rates are based on guess-work—not actual Google data—because Salesforce could only attempt “a

1 statistical analysis ... to estimate the inboxing rate.” FAC ¶ 36; see MTD 2.

2 The obvious alternative explanation is that the inboxing issue was resolved after
3 “nearly a year” of discussions about it. FAC ¶ 52. The RNC disagrees, speculating that
4 if true the RNC would have experienced similar inboxing issues past October 2022 be-
5 cause it did not change its bulk-email practices. Opp. 7-11. But again, the RNC does
6 not dispute that Gmail’s complex spam filters could take time to diagnose and resolve,
7 MTD 18, or that “spam complaints have a lasting negative impact,” *Salesforce Guid-*
8 *ance*. Nor does the RNC even consider whether the behavior of its email recipients
9 may have changed after early October 2022—even though the RNC recognizes that
10 users’ spam complaints are one of the main drivers of inboxing rates. Those are emi-
11 nently plausible explanations based on the facts alleged here. In contrast, it is pure
12 speculation to conclude, as the RNC urges, that the inboxing issue stopping somehow
13 shows that Google was discriminating against the RNC for its political viewpoints.

14 Finally, the RNC added two new sets of allegations: (1) Google supposedly cau-
15 tions its employees on what to “put in writing,” and (2) YouTube ““remove[s] or down-
16 grade[s]” “conservative viewpoints.” FAC ¶¶ 109, 110. Neither allegation makes the
17 RNC’s political-discrimination theory any more plausible. MTD 21. The RNC appears
18 to concede as much by failing to respond in its Opposition. See Opp. 4-12. The RNC
19 therefore forfeits these arguments. See *Carvalho*, 629 F.3d at 888.

20 All of that reinforces the obvious explanation for the inboxing issue: As Google
21 told the RNC, Gmail sent messages to spam when the RNC periodically built up
22 sufficient user complaints “over the course of the month and [Gmail] eventually
23 cause[d] [RNC] email to be diverted to Gmail users’ spam folders” or when the RNC’s
24 emails contained suspicious “links.” FAC ¶¶ 85, 94. That explains the RNC’s high
25 spam-complaint rates. That explains the A/B test. And that explains why, contrary to
26 the RNC’s theory that Google targeted vital fundraising periods, inboxing issues
27 occurred sometimes at the start of the month, sometimes mid-month, and sometimes
28 not at all. As compared to that obvious alternative explanation, the RNC’s political-

discrimination-by-algorithmic-spam-filtering theory has never been plausible.

2. Section 230(c)(2)(B) and (c)(1) also bar the RNC's claims.

Though the Court did not address these forms of protection previously, Section 230(c)(2)(B) and (c)(1) also bar the RNC's claims. See MTD 23-25.

The RNC contests Section 230(c)(2)(B), arguing that it applies only when a platform "hand[s] the censorship tools over to users" and that Google is "unilaterally relegating the emails to spam, not its users." Opp. 22. But neither is true. Section 230(c)(2)(B) applies to algorithmic spam filters that incorporate user complaints. See *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 (9th Cir. 2009) (rejecting "that § 230(c)(2)(B) cannot apply for the additional reason that [defendant], rather than the customer, determines that [plaintiff] is malware"). Moreover, Google is not filtering emails "unilaterally." As the RNC does not dispute, that process incorporates user feedback "[w]hen Gmail users mark emails as spam." Dkt. 30-13 at 3.²

Section 230(c)(1) also applies. See MTD 24. The RNC again misinterprets Section 230(c)(1)'s protections as turning on whether the claim "seek[s] to impose liability based on [the published] information's improper content." Opp. 25 (second alteration in original) (quoting *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 120-121 (4th Cir. 2022)). But *Henderson* applies when a plaintiff seeks to hold a defendant liable for making content available to others. See 53 F.4th at 124 n.18; *Divino Group LLC v. Google LLC*, No. 19-cv-04749, 2023 WL 218966, at *2 (N.D. Cal. Jan. 17, 2023) (recognizing this distinction). Here, of course, the RNC seeks to hold Google liable for allegedly *not* making emails available. Though Google argued this distinction previously, Dkt. 38 at 15, the RNC does not address it. See Opp. 25.

III. Conclusion

For these reasons, Google respectfully requests that this Court grant the Motion and dismiss with prejudice the RNC's Verified First Amended Complaint.

² The RNC also urges this Court to create an exemption to Section 230(c)(2)(B)'s protections for conduct "based on political-affiliation discrimination." Opp. 23. As Google explains, though, the Ninth Circuit has never recognized such an exception. MTD 24 n.6. Nor should this Court.

1 Dated: February 8, 2024

PERKINS COIE LLP

2
3 By: *Michael R. Huston*

4 Michael R. Huston (*pro hac vice*)

Sunita Bali, Bar No. 274108

5 Ryan Spear (*pro hac vice*)

Matthew Koerner (*pro hac vice*)

6 Angie Young Kim, Bar No. 270503

7 Tyler Fergusson, Bar No. 345065

8 *Attorneys for Defendant Google LLC*

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been served upon all counsel of record, via the Court's CM/ECF system on February 8, 2024, as follows:

Harmeet K. Dhillon (harmeet@dhillonlaw.com)
Michael A. Columbo (mcolumbo@dhillonlaw.com)
Jeremiah D. Graham (jgraham@dhillonlaw.com)
Anthony J. Fusaro, Jr. (afusaro@dhillonlaw.com)
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, California 94108
Telephone: (415) 433-1700

Thomas R. McCarthy (tom@consovoymccarthy.com)
Thomas S. Vaseliou (tvaseliou@consovoymccarthy.com)
Conor D. Woodfin (conor@consovoymccarthy.com)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
Telephone: (703) 243-9423

Counsel for Plaintiff
Republican National Committee

/s/ Michael R. Huston
Michael R. Huston